

Liquidator's Duties in The Rehabilitation of Abandoned Housing Projects in Peninsular Malaysia: A Legal Analysis*

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ABSTRACT

The duties of the liquidator are expressly provided under the Companies Act 1965 ('CA'). Basically the liquidator duty in the winding up administration is to accumulate all moneys and assets of the wound up companies and then to pay off all the debts of the creditors, before ceasing the existence of the company and strike off the company's name from the company's registration roll. The issue in abandoned housing project in Malaysia is this: whether the liquidator of the wound up housing developer company is under an obligation to rehabilitate the abandoned housing projects? This paper finds that, it is arguable that the liquidator is duty bound to undertake rehabilitation of abandoned housing projects and to protect the rights and interests of the aggrieved purchasers. There is no decisive case law in Malaysia that holds that the liquidator is statutorily responsible to rehabilitate abandoned housing projects and protect the rights and interests of the purchasers. The position of the liquidator is unlike the position of the trustee in bankruptcy, where the latter is obliged to act on behalf of the bankrupt person in executing and implementing the bankrupt persons' responsibilities towards any interested persons. This paper analyses the statutory provisions and the case law concerning the liquidator's duties as available under the Companies Act 1965 and the case law in Malaysia. It further emphasizes the lacunae in the law concerning the duty of the liquidator in dealing with the issue of rehabilitating abandoned housing projects and protecting the rights and interests of the purchasers.

Keywords: Abandoned Housing Project; Duties of Liquidator; Rehabilitation of Abandoned Housing Projects; Company Law; Malaysia.

BACKGROUND

Abandoned housing projects are a negative fact plaguing the housing industry in Peninsular Malaysia. Although the housing industry in Peninsular Malaysia plays an important role in the development of the nation, supported by dynamic policies and legal means for ensuring its success, the occurrences of abandoned housing project have, hitherto, marred its role towards national development and the safeguarding the interests of its citizen purchasers. As a result, many purchasers have become victims of abandoned housing projects. There are various reasons causing the abandonment and the consequential problems they have caused are also grave.

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One of the reasons is that there are insufficient legal provisions and protections for avoiding abandonment and in the protection of the interests of purchasers. In the event rehabilitation can be carried out, the ensuing problems caused—pecuniary and non-pecuniary losses, still hitherto become unsettled issues to most of the purchasers and the stakeholders, without any sufficient remedies and measures to address them¹

DEFINITION OF ABANDONED HOUSING PROJECTS

Currently, a housing project in Peninsular Malaysia can be deemed to have been abandoned when:

- 1) A housing project which is not completed within or beyond prescribed period of the sale and purchase agreement and there is not obvious activities on the site project for six (6) months consecutively; or,
- 2) Petition to wind up the housing developer company has been filed at the High Court pursuant to section 218 of the Companies Act 1965; or,
- 3) The developer company is put under the control of the Receiver & Manager; or,
- 4) The developers admit in writing to the Housing Controller that they are unable to complete their projects; and,
- 5) The project is endorsed as an abandoned housing project by the Minister of Housing and Local Government pursuant to section 11(1)(c) of the Housing Development (Control and Licensing) Act 1966 (Act 118).²

TYPES OF INSOLVENCY OF HOUSING DEVELOPER COMPANIES IN ABANDONED HOUSING PROJECTS

There are three possible types of insolvencies for abandoned housing projects' developers in Malaysia, namely:

Liquidation or winding up of companies;
Receivership; and
Scheme of Arrangement.

Liquidation or Winding Up of Companies

There are two types of liquidation, viz:

- 1) Compulsory liquidation; and
- 2) Voluntary liquidation.

For the purpose of this paper, the author will only discuss compulsory liquidation as this type of liquidation is the common choice of liquidation for winding up the housing developer companies whose housing projects are abandoned.

¹ Nuarrual Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework", (Phd in Law Thesis, International Islamic University Malaysia, 2009), p. 1.

² E-Home, Portal Rasmi Jabatan Perumahan Negara, "Pemaju Berstatus Sakit & Lewat", accessed 24 April 2013; available from <http://ehome.kpkt.gov.my/main.php?Content=vertsections&SubVertSectionID=123&VertSectionID=116&CurLocation=119&IID=>.

Compulsory Liquidation

Compulsory liquidation usually is made by order of the court. Those who are entitled to apply to the court to liquidate a company under section 217 of the Companies Act 1965 ('CA') are:

- 1) the company;
- 2) the creditor³; and,
- 3) the contributory⁴.

Circumstances In Which A Company May Be Wound Up By Court

Pursuant to section 218 of the CA the following situations may render a company to be subject to a winding up petition on the application of the above parties.

...

- (e) the company is unable to pay its debts;

...

The above reason (e) is the most common ground in which housing developer companies are wound up on the application to the Court by the creditors. Examples of housing developers that have been wound up due to inability to pay their debts to creditors are illustrated in the following table.

Pursuant to section 218(2) of the CA, the definition of 'inability to pay debts' is as follows:

- a) the company is indebted a sum exceeding RM 500.00 to a creditor and the creditor has served on the company by leaving at the registered office a demand requiring the company to pay the sum so due and that the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- b) the company has failed to satisfy in whole or in part the execution or other process issued on a judgment, decree or order of any court in favour of a creditor; or,
- c) The Court is satisfied that the company is unable to pay its debt including the contingent and prospective liabilities of the company.

³ According to Walter CM Woon, any creditor, secured or unsecured, may present a petition for the winding up of the company. A prospective or contingent creditor may also present such a petition. A contingent creditor is a creditor in respect of a debt which will only become due upon the happening of an event which may or may not occur. A prospective creditor is a creditor in respect of a debt which will certainly become due in the future, either on some date which has been already determined or on some date determinable by reference to future events. A person who claims damages against a company is not a creditor until he has obtained judgment. A person who bases his claim to be a creditor on a debt that is disputed on substantial grounds has no *locus standi* to present a petition. This is because he is not a creditor until the debt is established. See Walter CM Woon, *Company Law* (Singapore: Longman Singapore Publishers Ltd, 1988), 476-477.

⁴ According to Walter CM Woon, a contributory is a person who is liable to contribute to the assets of a company in the event of a winding up (section 4 of the CA). This includes the past and present members of the company. Although a holder of fully-paid shares does not have to contribute towards the assets of the company on a winding up, such a person is nevertheless included in the definition of "contributory". A director whose liability is unlimited is also a contributory. In the case of a contributory who is dead, his personal representatives have the right to present a petition for winding up. Where a contributory is bankrupt, the right to present the petition vests in his trustee or in the Official Assignee. Ibid, 477.

Table 1: Examples of List of Abandoned Housing Projects, Their Insolvent Housing Developer Companies, Dates of Winding Up, Number of Purchasers, Housing Units Involved and Types of Housing Development

No.	Project and Location	Developer Company's Name	Date of Winding Up	Liquidator	Number of Purchasers	No of Units Involved and Types of Development
1.	Pangsapuri Seri Pertama Sungai Petani, Mukim Sungai Petani, District of Kuala Muda, Kedah ⁵	JB Kulim Development Sdn. Bhd	25 May, 2004	Kedah Department of Insolvency – the Official Receiver	14 purchasers	35 units of apartment
2.	Palma Ria Kondominium Kuah, Bandar Kuah, Langkawi, Kedah ⁶	PRJ (M) Sdn. Bhd.	14 December, 2006	Kuala Lumpur Department of Insolvency – the Official Receiver	30 purchasers	108 units of condominium
3.	Taman Pinggir Rishah Hijau Ipoh, Perak ⁷	Magpie Resources Sdn. Bhd.	24 August, 2000	Perak Department of Insolvency – the Official Receiver	404 purchasers	10 units of shop units and 422 units of double storey low cost houses

Purpose of Liquidation

The purpose of liquidation is to accumulate all assets and liabilities of the company by the liquidator to settle all the debts of the creditors, to return the remaining proceeds surpluses, if any, to the members of the company and finally to cease the existence of the company. To achieve this objective, the liquidator will take over the management and affairs of the company. The directors, generally, no longer have the power to run the company. This is the primary power of the liquidator. This power is fully prescribed under section 236(1) and (2) of the CA. The difference between section 236(1) and section 236(2) is that under section 236(1) of the CA the liquidator needs to get authority either from the Court or the Committee of Inspection. Among the powers under section 236(1) of the CA are:

- a) to carry on the business of the company so far as is necessary for the beneficial winding up thereof;
- b) to make any compromise or arrangement with creditors or persons claiming to be creditors; and,
- c) to appoint an advocate to assist him in his duties.

⁵ File number: KPKT/08/824/6741-1.

⁶ File number KPKT/08/824/6585-1.

⁷ File number KPKT/08/824/5737-1.

While the powers under section 236(2), among others, are:

- 1) to compromise any debt due to the company other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit;
- 2) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;
- 3) to do all acts and execute in the name and on behalf of the company all deeds receipts and other than documents and for that purpose use when necessary the company's seal;
- 4) to appoint an agent to do any business which the liquidator is unable to do himself; and,
- 5) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

Notwithstanding the fact that before carrying out these powers, prescribed under section 236(2), the liquidator need not require any authority from the Court or the Committee of Inspection, nonetheless pursuant to section 236(3) the exercise of these powers shall still be subject to the control and scrutiny of the Court on the application of the creditor or contributory if the creditor or contributory considers that his interest and right in the insolvent company or during the liquidation administration may be affected by the exercise of such liquidator's powers. This provision (section 236(3)), it is submitted, is to ensure check and control over the liquidator's powers by the Court in the protection of the creditor or contributory's rights and interests.

The above caveat also is applicable for the powers under section 236(1) of the CA. Further section 277(2) of the CA reinforces the power of the Court to control the conduct of the liquidator on the application of the creditor or contributory or the Official Receiver ('OR') if the liquidator does not faithfully perform his duties and observe the prescribed requirements.

Apart from section 236(3) of the CA, pursuant to section 237(1) of the CA, in the administration of the assets of the company and in the distribution thereof among its creditors, the liquidator shall have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection. In case there is a conflict between the direction of the committee of inspection and the directions of the creditors and contributories, the directions of the latter shall prevail (section 237(1) of the CA).

A question can be raised *viz* whether the liquidator is under a responsibility to revive the abandoned housing projects of the wound up companies? Based on the above provision, it is opined that the liquidator is liable to carry out rehabilitation. Nonetheless this is subject to the sanction/authority of the creditors, contributories, Committee of Inspection and the Court, as the case may be (sections 236(1)(3) and section 237(1) of the CA). If these parties do not allow the liquidator to carry out the intended rehabilitation, the liquidator shall not carry out the same. Yet, in the opinion of the author, even if these parties (creditors, contributories and Committee of Inspection) are not agreeable to such a request, the aggrieved purchasers may invoke Order 92 Rule 4 of the High Court's Rules 1980 (inherent power of the Court)⁸ and section 23(1) of

⁸ Note that from 1 August 2012 onward, the Rules of High Court 1980 has been repealed and replaced by new rules known as the Rules of Court 2012 (P.U.(A) 205). There are many amendments made to the previous Rules of High Court 1980 and the new rules have been incorporated into the Rules of Court 2012. However, Order 92 rule 4 is still retained in the new Rules of Court 2012. The repeal and amendments were made vide Rules of Court (Amendment) 2012 P.U.(A)232.

the Courts of Judicature Act 1964⁹ to request the Court to rely on its inherent power acceding to the request of aggrieved purchasers' to have the abandoned housing projects rehabilitated by the liquidator on the ground of public interest.

The refusal to allow rehabilitation may be due to the fact that there are insufficient enough funds to finance the rehabilitation costs. Thus, in this circumstance, the aggrieved purchasers have no redress to have their abandoned housing projects be revived or at least to get appropriate compensation and damages from the wound up housing developer companies.¹⁰

Nonetheless, should there arise a situation where the liquidator is of the opinion that it is viable to rehabilitate the abandoned housing projects and this is still rejected by the creditors or contributories or the Committee of Inspection, as the case may be, the liquidator may apply to the Court for directions to obtain the required authority and sanction to proceed with the intention to rehabilitate the abandoned housing projects (section 237(3) of the CA). Secondly, the liquidator should bear in mind is that the property of the company, which may include the housing units sold to purchasers, does not vest in the liquidator on his appointment but remains vested in the wound up company.¹¹ Thus, a contract entered into by the wound up company earlier, is not determined by the commencement of liquidation, and remains in principle enforceable by action by or against the company.¹² It follows that in abandoned housing project, legally speaking, the aggrieved purchasers does not have a cause of action against the liquidator, but against the company, in respect of claiming legal and equitable remedies from the wound up company. However, even if the purchasers were to have a right to take action against the wound up company for damages and/or specific performance (rehabilitation), the action may

⁹ Section 23(1) of the Courts of Judicature Act 1964 provides:

Subject to the limitations contained in Article 128 of the Constitution, the High Court shall have jurisdiction to try **all** civil proceedings where-

- i) the cause of action arose; or
- ii) the defendant or one of several defendants resides or has his place of business; or
- iii) the facts on which the proceedings are based exist or are alleged to have occurred; or
- iv) any land the ownership of which is disputed is situated within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing, within the local jurisdiction of the other High Court. (emphasis added).

¹⁰ Most of the rehabilitation were left to the discretion of the rehabilitating parties with the cooperation and assistance of the chargee lender banks, purchasers, local planning authorities, local authorities, technical agencies, the states and federal authorities, the end-financiers, the land offices and the Ministry of Housing and Local Government ('MHLG') (currently renamed as 'the Ministry of Environment, Housing and Local Government'). The stringent laws governing housing development, land, banking, planning and building, were mostly made relaxed and flexible to accommodate the needs and to facilitate the due execution of the rehabilitation scheme. For example in *Hongkong and Shanghai Banking Corporation Ltd v. Kemajuan Bersatu Enterprise Sdn. Bhd* [1992] 1 LNS 26 (High Court), the court allowed the application of the creditor to appoint a provisional liquidator pending the disposal of a winding up petition for the purpose of rehabilitating the abandoned housing project carried out by the respondent company. Nevertheless, there are situations where there is no requisite assistance to facilitate the rehabilitation scheme, to the detriment of the purchasers desiring the project so abandoned to be revived. For example in *Mohammad bin Bae v. Pembangunan Farlim Sdn. Bhd.* [1988] 3 MLJ 211, the court refused the application of the purchasers to have the abandoned housing project revived by the newly appointed receiver and manager because of the difficulty to supervise the rehabilitation process. However, the court granted damages to the purchasers. This problem also occurred in *Wong Fook Too & Anor v Perwira Indra Sakti Sdn Bhd* [Suit No. D-28-51-2006] (High Court of Malaya at Kuala Lumpur) where the housing developer company was wound up by the court on the application of the aggrieved purchaser. The aggrieved purchaser applied to the court to compel the developer to complete the abandoned housing project. The court disallowed the application of the aggrieved purchaser on the ground that this will prejudice the interests of the creditors. Instead, the aggrieved purchaser was only allowed to file proof of debts ('POD') to the liquidator.

¹¹ Gareth Jones & William Goodhard, *Specific Performance*, Butterworth & Co, London, 1986, 174-175.

¹² *Ibid.*

not be feasible if the company does not have adequate means to carry out rehabilitation or the problems in the abandoned housing projects are too chronic. It should be noted that in practice, in any legal action against the wound up company or to be wound up company, the purchasers should also name the liquidator, as the affairs and businesses of the company are subject to the control of the liquidator.

Priority of Debts Payment

Once the liquidator has completed carrying out the liquidation process and has realized all assets and liabilities of the company under liquidation, the proceeds from the process must be distributed to the debts mentioned in section 292(1) in order of preference. These debts shall be paid in priority to all other unsecured debts. The order of priority of debts, pursuant to section 292(1) of the CA, is as follows:

- 1) the costs and expenses of winding up;
- 2) all wages or salary under any contract of employment or award or agreement;
- 3) all amounts due in respect of worker's compensation fund;
- 4) all remuneration payable to any employee in respect of vacation leave etc;
- 5) all amounts due in respect of contributions relating to employees superannuation or provident funds or retirement benefit which is an approved scheme under the federal law relating to income tax; and,
- 6) the amount of all federal tax assessed.

Where all the above debts have been fully settled, the unsecured debts due of the wound up company will then rank in *pari passu*.

A question can be raised: whether the liquidator can use the proceeds from the liquidation administration to fund the rehabilitation of abandoned housing projects? It is opined, yes, the liquidator can do so, provided there are enough balance proceeds after deducting against the above priority of debts and that these balance should settle all the unsecured debts (including to finance the rehabilitation costs) in *pari passu*. The principle of *pari passu* means the creditors's debts and claims will be shared equally among them using the balance of the assets and moneys of the company after deducting the claims and debts of the above listed parties/matters.¹³ This also may mean that, if there is not enough balance funds, the liquidator may not be able to run the rehabilitation.

Alternatively, if the liquidator can utilize the moneys held under the Housing Development Account (HDA) which is protected by section 7A (6)(a)(b) of the Housing Development (Control and Licensing) Act 1966 (Act 118) and that this money shall not be subject to the priority of payment under the winding up and receivership, pursuant to section 191(1) and section 292 of the CA, then it is possible to revive the project so abandoned, provided, the moneys (the money in the HDA and the liquidation balance proceeds) are sufficient to meet all the rehabilitation expenditure.

¹³ See Andrew Keay & Peter Walton, *Insolvency Law, Corporate and Personal* (Essex: Pearson Education Limited, 2003), 338.

The Superiority of the Creditors and Contributories

Clearly under the CA, the creditors and the contributories of the company enjoy a special position in the control of the powers of the liquidator in the course of undertaking the liquidation process. It is opined, unless the aggrieved purchasers in abandoned housing projects have obtained a court judgment/judgment debts for all the damage and losses they suffered and they have filed proof of debts¹⁴ ('POD') pursuant to section 291(1) of the CA read together with rule 78 of the Companies (Winding-Up) Rules 1972, their rights may not be protected, at least in getting compensation and damages. Let alone to have their abandoned housing projects revived. It should be borne in mind that none in the above priority of payment provide a special provision for the stakeholder in abandoned housing projects, particularly the aggrieved purchasers, to have their abandoned houses rehabilitated or at least be given compensation and damages for their losses and sufferings due to the abandonment.

Effect of Liquidation

Once a winding up proceedings commences (i.e. after the presentation of a winding up petition on the judgment debtor), no disposition of the company property, attachment, sequestration, distress or execution against the estate of the company either by the mortgagees or purchasers are allowed except with the order of the Court (sections 222, 223, 224 and 225 of the CA¹⁵). Thus, any act of the company to sell the immovable property after the winding up petition is served, will be null and void, unless the Court orders otherwise. Similarly, it is submitted, if the chargee of the judgment debtor insolvent company wishes to enforce the charge and to obtain the Court's order /leave for sale pursuant to the provisions under the National Land Code 1965, he too may be barred from initiating the application for sale unless, the court allows him to proceed, on application to the Court.¹⁶

The purpose of the above law is to prevent the property and assets of the to-be-wound up company from being dissipated to the detriment of the interests of the creditors and contributories.¹⁷ Thus, all the assets and property of the company must be intact pending the

¹⁴ According to rule 79 of the Companies (Winding-Up) Rules 1972, a debt shall be proved in any winding up by delivering to the liquidator an affidavit verifying the debt together with the prescribed filing fee. Under certain circumstances on the ground of expediency and equity, the Court may allow the creditors not to file proof of debts (rule 78 of the Companies (Winding-Up) Rules 1972).

¹⁵ See also section 263 of the CA in respect of the creditor's voluntary winding up, which has similar effect.

¹⁶ Shanty Rachagan, Janine Pascoe & Anil Joshi, *Concise Principles of Company Law in Malaysia* (Kelana Jaya: LexisNexis, 2004), 492 and Cheang, Loh Siew, *Corporate Powers Accountability*, (Petaling Jaya: LexisNexis Butterworths, Second Edition, 2002), at page 1283, where this learned author states:

"Creditors holding valid securities over the property of a company **is usually allowed leave to commence action against the company to realize the security** unless some special grounds are shown, such as the secured creditor is offered immediately all that he is entitled to without need for an action or proceedings: *Re David Lloyd & Co* [1877] 6 Ch D 339, per Jessen MR at 343. This is because the subject matter of the security is not available to claims by the general body of unsecured creditors. Here, the liquidator cannot ask the secured creditor to surrender his security unless the secured creditor votes in respect of the whole of his debt and not the balance due from the company after having assessed the value of the security. If the amount realized from sale of the security is insufficient to cover the whole of the secured debt, the secured creditor joins the general body of unsecured creditors in proving the balance". (emphasis added).

¹⁷ See also Walter C M Woon, 496.

outcome of the winding up proceedings. Nonetheless, if the disposal of the assets and property is made and proven for the benefit of the company or there is a guarantee the proceeds from the disposal can be distributed fairly to the creditors and on the approval of the Court, the Court may allow such a disposal to take place.

Nonetheless the aggrieved purchasers, it is submitted, may also apply to the court for a stay of the winding up order pursuant to section 243 of the CA. The stay may be useful to enable rehabilitation of the abandoned housing project by the insolvent housing developer company to be carried out. The power to order a stay of winding up is discretionary in nature. Even though the application for a stay is normally supported by the recommendation from the liquidator, the court will not necessarily accept this recommendation for a stay and the court may have to look at each case as to whether the application can equitably be granted. In other words, the success of the application is dependent on the facts of each case. For instance in *Ting Yuk Kiong v. Mawar Biru Sdn. Bhd* [1995] 2 MLJ 700 (High Court at Johor Bahru), the court declined to grant a stay of winding up proceedings despite a strong recommendation by the liquidator. The court held that the granting of a stay of further proceedings of winding up is a discretionary matter for the court and the onus is on the applicant to make out a positive case for a stay. To the court, in order to obtain a stay of the winding-up proceedings, the applicant must convince the court that each member of the company had consented or would otherwise be bound not to object to it. In this case, although all the directors of the company had given their consent to the application, the members were still not given the same. In this case also, the court found that the company was insolvent. This could be known from the information revealed in the affidavit that there was sufficient information about the current trading activities and general solvency of the company. In addition, it appeared to the court that the provisional liquidator did not carry out a proper investigation into the affairs of the company before coming to the conclusion that the company was solvent, as his opinion appeared to be based on the fact that the company had RM120,000.00 cash in hand which did not in any way reflect the solvency of the company. The report also did not provide information about the company's audited accounts and the principal officers of the company. Be that as it may, the author is still doubtful that the insolvent housing developer companies which have been subject to the winding up proceedings have adequate moneys and the capability to run the rehabilitation. Thus, unless it is proven that the insolvent housing developer companies have adequate supporting fund to finance the intended rehabilitation, the application for a stay of winding up proceedings to enable rehabilitation be carried out is nugatory for the aggrieved purchasers.

Provisional Liquidator

The Court may appoint the Official Receiver or an approved liquidator as provisional liquidator, on the application of the creditors, contributories or the company, after the commencement of the winding up proceedings to preserve the status quo of the company's assets and property and facilitating the eventual beneficial winding up of the company, pending the disposal of the winding up petition.¹⁸ Like a liquidator, the power of a provisional liquidator is similarly subject

¹⁸ Walter C M Woon, 496, 498.

to the provisions prescribed under the Companies (Winding-Up) Order 1972 and the order of the Court appointing him (section 231 of the CA).

It is opined, bearing on the above law, it is possible in abandoned housing projects, for a provisional liquidator to be appointed by the creditors, contributories or the company for carrying out rehabilitation of the projects provided the funds for running rehabilitation are available and sufficient.

A question can be raised: whether the aggrieved purchasers in abandoned housing projects can apply to the Court for the Court to appoint a provisional liquidator to carry out the intended rehabilitation? It is opined that it depends whether these aggrieved purchasers can be considered a creditor or otherwise. The aggrieved purchasers should first obtain judgment debts/court judgment against the company for damages, compensation or other equitable relief and file proof of debts (POD) before they can be considered as creditors of the company (judgment creditors). Nonetheless, can they (the aggrieved purchasers) also apply to the court for the same if they (the aggrieved purchasers) have yet obtained or failed to obtain the judgment debts or proof of debts? In the opinion of the author, they may be entitled to on the ground of equity. They can invoke Order 92 rule 4 of the Rules of the High Court 1980 and section 23(1) of the Courts of Judicature Act 1964 to request the Court to appoint provisional liquidator to implement rehabilitation on the ground of public interest and equity.

SUMMARY

The issues and problems in abandoned housing projects as elaborated in the foregoing paragraphs, illustrate the lacunae in the law and in practice as regards the powers and responsibilities of the liquidators to carry out rehabilitation of abandoned housing projects and to protect the purchasers' interests.

What can be concluded from the foregoing is that the insolvency of a housing developer is detrimental to the interests of the aggrieved purchasers to have their houses rehabilitated.

Certain salient points can thus be recapitulated, as follows:

- 1) Based on the literal reading of the provisions under the CA, the appointed liquidator, in the liquidation of a company, is liable to carry out rehabilitation of abandoned housing projects of the liquidated housing developer companies. Nonetheless this is subject to the sanction/ authority of the creditors, contributories, committee of inspection and the Court, as the case may be. If these parties do not allow the liquidator to carry out the intended rehabilitation, the liquidator shall not carry on the same;
- 2) The refusal to allow rehabilitation by the creditors, contributories, committee of inspection or the Court, as the case may be, may be due to insufficient funds to finance the rehabilitation costs or the abandoned housing projects are too problematic. Thus in these circumstances, the aggrieved purchasers have no redress to have their abandoned housing projects to be revived or at least to receive appropriate compensation and to be awarded damages from the liquidated housing developer companies;
- 3) If the liquidator is of the opinion that it is viable to commence rehabilitation of abandoned housing projects yet this is still not agreeable to the creditors or contributories or the committee of inspection, as the case may be, the liquidator may apply to the Court for

directions to obtain the required authority and sanction to proceed with the intention to rehabilitate the abandoned housing projects. However, their chance to revive the abandoned housing projects is slim if the creditors or contributories do not give the required consent;

- 4) Under the CA, it is opined, in the course of the liquidator undertaking the liquidation administration, the members, the creditors and the contributories of the insolvent company enjoy a special position in controlling the powers of the liquidator. This position is given by the CA in order to protect their rights and interests in the liquidation. It follows that unless the aggrieved purchasers in abandoned housing projects have obtained a court judgment for all the damage and losses they suffered and that they have filed proof of debts ('POD'), their rights and interests may be marginalized and not protected, at least to obtain compensation and damages from the proceeds of the liquidation administration. Let alone to have their abandoned housing projects revived;
- 5) It should be borne in mind that none in the list of the priority of payment relating to the law of liquidation under the CA, provide a special provision for the stakeholders in abandoned housing projects, particularly the aggrieved purchasers, unless they have become unsecured creditors, to have their abandoned houses rehabilitated or at least be given compensation and damages for their losses and sufferings due to the abandonment;
- 6) Once winding up proceedings commences (i.e. after the presentation of a winding up petition on the judgment debtor), no disposition of the company property, attachment, sequestration, distress or execution against the estate of the company either by the chargees or purchasers are allowed except with the order of the Court. Thus, any act of the company to sell the immovable property after the petition of the winding up is served, will be null and void, unless the Court orders otherwise. Similarly, it is submitted, that if the chargee of the judgment debtor insolvent housing developer company wishes to enforce the charge and obtain a court order for sale pursuant to the provisions under the National Land Code 1965, the chargee too may be prevented due to the existence of cause to the contrary and inequity and/or on the objection of the creditors or contributories of the insolvent company, from initiating the application for sale unless, on the chargee's application to the Court, the Court allows him to proceed with the foreclosure;
- 7) One of the purposes in the liquidation provisions under the CA is to prevent the property and assets of the insolvent company from being dissipated to the detriment of the interests of the creditors and contributories. Thus, all the assets and property of the company must be intact pending the outcome of the winding up proceedings. Nonetheless, if the disposal of the assets and property is made and proven for the benefit of the company or there is a guarantee the proceeds from the disposal can be distributed fairly to the creditors and on the approval of the Court, the Court may allow such a disposal to take place;
- 8) The Court may, on application, appoint the Official Receiver ('OR') or the approved liquidator as provisional liquidator, on the application of the creditors, contributories or the company, after the commencement of the winding up proceedings to preserve the status quo of the company's assets and property and thus facilitating the eventual beneficial winding up of the company, pending the disposal of the winding up petition. Like a liquidator, the power of the provisional liquidator is similarly subject to the provisions prescribed under the Companies (Winding-Up) Rules 1972 ('CWUR') and the order of the Court appointing him;

- 9) It is opined, bearing on section 231 CA (general provisions as to liquidators), it is possible in abandoned housing projects that a provisional liquidator be appointed by the creditors or contributories or the company to carry out rehabilitation of the projects provided the funds for running the rehabilitation are available and sufficient and thus can benefit the purchasers. Further the problems plaguing the abandoned housing projects must also be manageable and not too great to settle or otherwise the rehabilitation cannot be carried out; and,
- 10) The position reflected by the case law is rather mixed, in that, courts are divided between allowing rehabilitation and otherwise, once the developer is subject to liquidation or receivership. Thus, if the rehabilitation cannot be carried out, the purchasers will suffer losses and grievances for a long time or in perpetuity

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